COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018571-01**

Jose Carvajal	Employee
The Abrams Management Co.	Employer
Public Service Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
James K. Meehan, Esq., for the employee
Paul R. Matthews, Esq., for the insurer

CARROLL, J. The employee and insurer cross-appeal from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits. We affirm the decision as to the insurer's appeal. We recommit the case for the judge to address the employee's separate claim for his left ankle condition, which claim the judge failed to determine in the decision as it stands.

Mr. Carvajal, a sixty-three year old from the Dominican Republic, worked as a building maintenance man and assistant electrician performing heavy labor preparing apartments for occupancy. (Dec. 109.) On May 22, 2001, while he was installing molding around the base of a wall, the glue caught fire. The employee injured his right ankle when he slipped on water used to douse the fire. Since then, he has had three surgeries, wears an ankle brace, and often uses a cane. His left ankle began to hurt more than a year after his initial injury. The left ankle continues to bother the employee, and in the present proceeding, he joined a claim for liability related to that ankle to his claim for permanent and total incapacity benefits. (Dec. 107-109.)

Initially, the insurer accepted a low back and right ankle injury and paid

§ 34 total incapacity benefits. On August 28, 2003, it filed a complaint to modify or discontinue benefits. The insurer appealed the conference denial of that complaint and while the appeal was pending, the employee's § 34 benefits were exhausted on May 20, 2004. Thereafter the insurer paid § 35 partial incapacity benefits at the maximum rate. At hearing, the employee sought permanent and total incapacity benefits under § 34A and the insurer, although conceding ongoing disability, sought to limit the benefit to the maximum § 35 rate. (Tr. 3-4.)

The administrative judge found the employee to be totally and permanently incapacitated, relying on the employee's credible testimony of pain and difficulty doing everyday tasks, the testimony of a vocational expert and the impartial examiner, and considering the employee's age (63), eighth grade education, and past work experience. The insurer's appeal relates to the judge's statement that "[t]he impartial doctor found that the employee had a 'sedentary or very light' work capacity." (Dec. 111.) It argues this is a mischaracterization of the impartial physician's opinion.

Dr. Rynne diagnosed status post open reduction and internal fixation of a trimalleolar fracture of the employee's right ankle with fibular nonunion; status post bone grafting with residual symptoms; and musculoligamentous strain of the lumbar spine with ongoing residual symptoms. (Impartial Physician report, Dep. 7.) Extensive testimony was given on the issue of physical limitations, restrictions and work capacity. As the insurer points out, Dr. Rynne opined in his report of March 24, 2004, that Mr. Carvajal was not capable of returning to his regular line of work, but would be suitable for full-time employment of a sedentary or very light duty nature, with no prolonged standing or walking, no repetitive bending, squatting, lifting, heavy lifting or climbing, and that these were restrictions of a permanent nature. (Ins. br. 3-4). Dr. Rynne reiterated the above opinion:

> A. I felt that he was not capable of returning to his regular line of work … But would be suitable for full-time employment of sedentary very light duty nature with no prolonged standing or walking, no repetitive bending, squatting, lifting, heavy lifting and climbing.

(Dep. 9.)

When asked by insurer's counsel whether the employee would be capable of sitting at a desk and working on small electrical appliances, the doctor, while qualifying his answer by saying he was not a vocational expert, again opined that the employee could do "light duty that would not involve prolonged stand (sic), would not involve prolonged walking, and not involve repetitive bending, squatting, lifting, heavy lifting, or climbing." (Dep. 11.) Only in response to a question about whether any of the physical limitations would prevent the employee from "concentrating on the job that he has" did the doctor, for the first and only time[1], use the word moderate. (Dep. 12.) Later, Dr. Rynne went on to reiterate once more the employee's restrictions and describe them more fully, but he never retreated from his opinion of a light sedentary work capacity. (Dep. 22-24.) In this context, we can not say that the administrative judge mischaracterized or improperly relied on Dr. Rynne's opinion, and given the judge's findings as to the employee's vocational background, (Dec. 108), we affirm the decision as to the insurer's appeal.

Turning to the employee's appeal, we recommit the case for further findings on one issue. Although the left ankle claim was indisputably before the judge, he failed to render a conclusion as to its compensability. The employee is entitled to a decision on each issue presented to the judge for determination. G. L. c. 152, § 11B. See McCarthy v. Charrette Corp., 9 Mass. Workers' Comp. Rep. 272 , 274 (1995).

Accordingly, we recommit the case for further findings consistent with this opinion. As the employee has prevailed on the insurer's appeal, the employee is

[1] The insurer, (Ins. br. 4), is incorrect that at Dep. 23, Dr. Rynne opined that as long as the employee exercised common sense and avoided the activities that would likely aggravate a sore ankle, he could perform moderate work.

awarded a fee of $1,357.64 pursuant to § 13A (6).

So ordered.

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Martine Carroll
Administrative Law Judge

Filed: **April 18, 2006**

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge